

REPLY BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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16-498

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KENNETH GILYARD

Appellant

v.

ROBERT A. McDONALD,  
SECRETARY OF VETERANS AFFAIRS,

Appellee.

ALEXANDRA LIO  
CHISHOLM CHISHOLM & KILPATRICK  
One Turks Head Place, Suite 1100  
Providence, Rhode Island 02903  
(401) 331-6300  
(401) 421-3185 Facsimile  
Representatives for Appellant

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## APPELLANT'S REPLY ARGUMENT

**The Board failed to provide adequate reasons or bases for its denial of separate ratings under alternate diagnostic codes, specifically 5257 and 5259.**

The Secretary argues that there is insufficient evidence to warrant a separate rating under DC 5257, and thus, Appellant's arguments should fail. Sec. Br. at 6-8. His argument relies on an inaccurate assessment of the medical evidence of record and acts to provide reasons into the Board's decision which are absent. Accordingly, his argument is not persuasive and must fail.

First, the Secretary argues that evidence cited by Mr. Gilyard to support a finding of lateral instability are "isolated instances" not "recurrent" episodes. Sec. Br. at 6-7. His argument fails to explain how this is so. First, the treatment notes indicating instability are from three consecutive months, March, April, and May of 2012. R-1200, R-763, R-832. This would suggest that the condition was in fact "returning or happening time after time" as opposed to "isolated" as the Secretary suggests.

Second, the Secretary's argument that the evidence of record is not relevant because it does not reflect recurrent subluxation is not otherwise reflected in the Board's decision. The Board provided a bald conclusion that there was "no evidence of subluxation or instability." R-13. However, the record clearly contains evidence of subluxation or instability. The Board provided *no* discussion of this favorable and material evidence. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000). While the

Secretary attempts to supplement the Board's missing analysis, his argument amounts to nothing more than *post hoc* rationalization which is not entitled deference. *See Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 156 (1991) (“[A]gency ‘litigating positions’ are not entitled any deference when they are merely appellate counsel’s ‘*post hoc* rationalizations’ for agency action.”).

The Secretary next argues that the other evidence cited by the Veteran in his opening brief is not evidence of instability. Sec. Br. at 7-8. Rather, he argues that such a determination is a medical one and beyond the knowledge of the Veteran. *Id.* Again, as an initial matter, the Board failed to make any of these factual determinations in the first instance and it did not account for *any* of the evidence cited by the Veteran in his brief.

However, to address the Secretary's argument, he fails to cite to any authority for the proposition that instability of station is not something that a person is capable of observing. *See* Sec. Br. at 8. Nor does he establish that the regulation *requires* objectively confirmed evidence of instability. *See id.* Without such support, his argument must fail. Accordingly, the record demonstrably raises the issue of entitlement to separate ratings under DC 5257 and the Board's decision lacks adequate reasons or bases for its decision as to this issue.

The Secretary also argues that the Board was not required to provide any discussion of entitlement to a rating under DC 5259. Sec. Br. at 8-9. His argument rests on the assertion that “Appellant has not shown that he or his counsel has the

medical expertise to opine that a torn cartilage or degenerative joint disease is somehow synonymous with complete removal of the semilunar cartilage with symptoms due to such removal.” Sec. Br. at 9. However, he misses the point.

Mr. Lopez did not argue that the evidence established his entitlement to a rating under diagnostic code, but only that the record indicated that the issue was *raised* and thus, the Board erred by failing to adjudicate it. Apa. Op. Br. at 7-8. Because this evidence may give rise to a rating under DC 5259, either directly or in conjunction with the application of other regulations such as 38 C.F.R. § 4.7 (2015), the relevance of the evidence cited in the Veteran’s opening brief should have been discussed by the Board. As the Board did not address it or account for its rejection of this evidence in assigning a higher rating, its decision lacks adequate reasons or bases. 38 U.S.C. § 7104. Thus, its decision should be vacated and the appeal remanded.

## **CONCLUSION**

In view of the foregoing, the Board’s decision that denied Mr. Gilyard separate ratings under DC 5257 or 5259 should be vacated and the appeal remanded with instructions for the Board to ensure that the law is properly applied and interpreted and to provide adequate reasons and bases for its decision.

Respectfully submitted,  
Kenneth Gilyard,  
By His Representatives,  
CHISHOLM, CHISHOLM & KILPATRICK  
By /s/ Alexandra Lio  
ALEXANDRA LIO

One Turks Head Place, Ste. 1100  
Providence, RI 02903  
(401) 331-6300 (401) 421-3185 (facsimile)